Supreme Court, U.S.
FILED
JAN 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-489

IN THE

Supreme Court of the United States

October Term, 1985

LEONARD C. JAQUES

v.

THE HONORABLE ANN ALDRICH, United States District Judge for the Northern District of Ohio, and REISS STEAMSHIP COMPANY

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR THE HONORABLE ANN ALDRICH, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

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QUESTIONS PRESENTED

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A. Is a civil contempt proceeding required to have all the due process controls of a full criminal prosecution?

B. In any event, was the Petitioner in this case accorded all the requisite due process safeguards?

II.

A. Is a Trial Counsel's failure to appear for trial in accordance with a Trial Order a violation of 18 U.S.C. § 401(3)?

B. Does the appearance of substitute counsel who is unprepared and does not have full authority to try or settle the case relieve Trial Counsel of his responsibility to appear?

III.

A. Is Trial Counsel's failure to appear for trial on a date which he requested "misbehavior" in the "presence" of the Court or "so near thereto" as to obstruct the administration of justice under 18 U.S.C. § 401(1)?

B. Alternatively, can Trial Counsel be held in violation of 18 U.S.C. § 401(1) as a result of a misrepresentations made directly to the Court by and through associate counsel regarding Trial Counsel's reasons for failing to appear for a scheduled trial?

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STATEMENT OF THE CASE

This brief is filed on behalf of The United States District Court for the Northern District of Ohio, The Honorable Ann Aldrich, District Judge. It is filed in opposition to the petition filed by Leonard C. Jaques, Esq. requesting this Court to grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the District Court, which held Petitioner in contempt of court.

FACTS

Petitioner represented a plaintiff in the underlying case before the District Court, *Ahmed v. Reiss Steamship Co. (Civil Action No. C 80-506)*. Petitioner was listed on the Court's docket sheets as attorney for the plaintiff. (Exhibit C, Memorandum and Order, Pet.App. 37a; clearer, complete copy, Respondent's App. A-1). He filed the Complaint in the case and he was listed as the "Trial Counsel" on the Plaintiff's "Trial Brief." (Exhibit A, Memorandum and Order, Pet.App. 35a). Petitioner was handling the case for the plaintiff. (Tr. 10/26/83 P.T. 4, Pet.App. 45a).

The Court set a firm trial date as a courtesy to Petitioner and his client since his client was represented to be in Yemen and had to travel to Ohio for the trial.[1] It was not the regular practice of the Court to grant firm trial dates. The Court, however, "was pursuaded that Jaques' case presented unusual circumstances which warranted exceptional scheduling arrangements and the October 24, 1983 trial date was guaranteed." (Memorandum and Order, Pet.App. 19a). October 24, 1983 was the date ultimately set for the pre-trial and October 25, 1983 for the trial. On August 1, 1983, the Court sent a notice/order captioned a "Trial Order" to counsel, which set the pre-trial and trial dates, required counsel to file pre-trial briefs and attend to other matters.

[1] This representation now appears to be inaccurate. *See* Memorandum and Order, Pet.App. 19a, n.1.

Petitioner called the Court on Wednesday, October 19, 1983, spoke to Judge Aldrich's deputy clerk, William Johnson, and requested that the pre-trial and trial dates be postponed one day because he was on trial in Baltimore. The deputy clerk rescheduled the pre-trial to October 25 and the trial to October 26. The docket sheet indicated the conversation that the clerk had with Petitioner. It states: "10-19-83 phone con with Jaques — move P.T. to 10-25-83 4:30 & T. to 10-26-83 9:30, per Dailey's secy per Swickle's secy." (Docket Sheet, Exhibit C to the Memorandum and Order, Pet.App. 37a; clearer, complete copy, Respondent's App. A-1). The pre-trial was later moved to the same day as the trial (October 26, 1983). Petitioner had direct knowledge of the trial date since it was set in the October 19 conversation between Petitioner and deputy clerk Johnson.

On Monday, October 24, 1983, the deputy clerk called Judge Howard's chambers at the District Court in Baltimore. He left word reminding Petitioner that he was to appear before Judge Aldrich in Cleveland on October 26, 1983 for the pre-trial and the trial. (Docket Sheet, Exhibit C to the Memorandum and Order, Pet.App. 37a; clearer, complete copy, Respondent's App. A-2). Petitioner admitted having received the message from Judge Howard's secretary. (Tr. 12/22/83 Hearing 19, Pet.App. 59a).

In his brief, Petitioner argues that the deputy clerk's phone call to Judge Howard's chambers was the only communication from the Ohio Court regarding the October 26 trial date and that there is no indication that he actually received the message. (Pet. 4). The record indicates otherwise. First, the docket sheet reflects a conversation on October 19, 1983 between the deputy clerk and Petitioner himself at which time October 26 was set as the trial date. (Docket Sheet, Exhibit C to the Memorandum and Order, pet.App. 37a; clearer, complete copy, Respondent's App. A-1). Second, Petitioner admitted at the December 22 hearing that he in fact received the message from Judge Howard's secretary. (Tr. 12/22/83 Hearing 19, Pet.App. 59a).

At 6:00 p.m. on October 25, 1983, the evening before the pre-trial and trial, petitioner's associate, Gary Baun, called the Court and said that Petitioner could not be in Cleveland the following day because he had to remain before Judge Howard while the jury instructions were given.[2] By the time of Baun's call, it was too late to recall the venire panel notified to appear the next day. (Memorandum and Order, Pet.App. 20a).

On the October 26, 1983 scheduled date for pre-trial and trial, Petitioner did not appear. Rather he sent an associate, Robert Swickle. (Memorandum and Order, Pet.App. 27a). Settlement negotiations were stalled because Petitioner was not available. Swickle stated that he had been "pressed in for this" and that before any further progress could be made, the client had to speak with Petitioner, because "Mr. Jaques was handling the case." (Tr. 10/26/83 P.T. 4, Pet.App. 45a). Swickle represented that to his knowledge, Petitioner was in Baltimore in trial. (Tr. 10/26/83 P.T. 2, Pet.App. 43a).

[2] Baun spoke with Judge Aldrich's law clerk. (Pet. 5). The clerk said that Baun told her that neither Baun nor Petitioner would be able to appear the following day in Cleveland because of the trial in Baltimore. (Memorandum and Order, Pet.App. 20a). Baun and Petitioner maintain that Baun made no representations to the Court about Petitioner, but only stated that he, Baun, would not be able to attend the trial in Cleveland (Pet. 5). If Baun really said nothing at all about Petitioner's intentions, then Petitioner's behavior in not appearing for a scheduled trial and not even calling the Court with an excuse is even more bizarre than it first appears.

Petitioner further claims that since there was no evidence of Baun having represented anything about Petitioner's whereabouts to the Court, the Court's holding Petitioner in contempt under 18 U.S.C. § 401(1) was in error. This completely misreads the District Court's Memorandum and Order. At no point did the District Court base its finding of contempt under § 401(1) upon anything with respect to the Baun phone call of October 25, 1983. As noted in Argument III, *infra*, the District Court's reference to "misrepresentations" referred solely to the statements of Petitioner's associate, Robert Swickle, made directly to the Court at the pre-trial on October 26, 1983, that Petitioner was in Baltimore in trial. *See* Memorandum and Order, Pet.App. 27a.

At an impasse, Judge Aldrich had attempted to reach Petitioner in Baltimore by placing a call to Judge Howard. Judge Howard informed Judge Aldrich that he had excused Petitioner the day before specifically so Petitioner could appear before Judge Aldrich as required.

Judge Aldrich admonished Swickle about the apparent inconsistency in Petitioner's representations and the wasted expense of the venire panel and opposing counsel's time. Judge Aldrich directed Swickle to locate Petitioner and tell the Court by 4:45 p.m. that day (Wednesday) whether it would be necessary to recall the jury on the next day, Thursday. (Tr. 10/26/83 Hearing 5-6, Pet.App. 45a-46a). No one called the Court, however, until Thursday at 4:15 p.m. when Petitioner called to say that his client had rejected a settlement offer. Trial was set for Friday October 28, 1983. Due to additional conflicts on the part of Petitioner, the trial was rescheduled for Tuesday, October 31, 1983. The case was settled on Monday, October 30, 1983.

On November 2, 1983, the Court issued an Order to Petitioner and his two associates, Swickle and Baun, to appear before it and show cause why sanctions should not be imposed against them and why they should not be held in contempt.

A hearing was held on December 22, 1983 at which Petitioner represented himself and his associates. Throughout most of the hearing, Petitioner refused to answer the Court's question as to the reason Petitioner failed to appear for trial. Petitioner complained about the intrusion of the hearing upon his schedule "during this busy season." (Tr. 12/22/83 Hearing 6, Pet.App. 51a). When he finally did reply, Petitioner said:

> MR. JAQUES: I wasn't here because I couldn't be here. I was not here, Judge, because I had the screaming itches of the crotch. I was so badly in need of medical care that I had been in communication with my physi-

cian a lot. I wasn't here because I would have been scratching my testicles constantly if I had been here.

Judge —

The Court: Mr. Jaques —

Mr. JAQUES: Judge, do you understand that?

THE COURT: You don't have to be so graphic. You could have simply let the Court know that for medical reasons you were not going to be here and you could have —

MR. JAQUES: Judge, it was not a medical reason that could have been framed earlier. That's one thing.

THE COURT: It doesn't seem awfully difficult to me. Is there anything else? (Tr. 12/22/83 Hearing, 29-30, Pet.App. 64a).

The District Court held Petitioner in contempt under 18 U.S.C. § 401. First, the Court held that Petitioner had violated the provisions of 18 U.S.C. § 401(1) because Petitioner's request on October 19 for a delay of the trial, and his failure to appear at the rescheduled trial when he misrepresented that he was appearing before another judge "combine to constitute misbehavior 'so near' the Court so as to fall within § 401(1)." (Memorandum and Order, Pet.App. 29a). Second, the Court held that Petitioner's failure to appear for trial on October 26, 1983 was a violation of an Order of the Court and fell within 18 U.S.C. § 401(3).

I. CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION OF WHETHER A CIVIL CONTEMNOR SHOULD BE ENTITLED TO ALL THE DUE PROCESS PROTECTIONS AFFORDED A CRIMINAL CONTEMNOR: (1) WAS NOT RAISED BELOW; (2) IS NOT PRESENTED BY THE PARTICULAR FACTS OF THIS CASE; AND (3) IS WELL-SETTLED BY THE DECISIONS OF THIS COURT OVER THE COURSE OF THIS CENTURY; THOSE DECISIONS SHOULD NOT BE OVERTURNED NOW.

Petitioner concedes that this case is one of civil contempt only. (Pet. 11). Petitioner, however, asks this Court to review this case in order to address the question of whether courts must apply all criminal due process protections to a civil contempt proceeding. Petitioner also claims that he was denied due process of law, and, as a result, that the decisions of the lower courts in this case are in conflict with the decisions of other circuits. (Pet. 11-20).

This request for review should be denied for several reasons. First, this issue was not raised below. Second, irrespective of the classification of Petitioner's conduct, Petitioner in this case *was* accorded all the due proces safeguards required for an ajudication of his liability for contempt; the decisions of the lower courts in this case are not in conflict with those of other circuits. Third, this Court has definitively addressed the issues of due process in the civil contempt context several times in this century, as recently as 1983, and further review at this time is not needed.

A. Petitioner did not raise in the lower courts the argument that civil contempt proceedings should have all the due process controls of criminal proceedings.

In his petition, Petitioner argues for the first time that a civil contemnor should be afforded the same due process safeguards as a criminal contemnor. Petitioner did not present this argument to the Court of Appeals or to the District Court. In the Court of Appeals, Petitioner argued "that

these proceedings were in fact criminal and failed to afford him the procedural due process he was constitutionally entitled to as a criminal defendant." *In re: Jaques*, 761 F.2d 302, 305, (6th Cir. 1985); (Pet.App. 4a). Petitioner also did not raise this issue in the trial court. *See, generally,* Tr. 12/22/83 Hearing, Pet.App. 48a-72a. Since Petitioner did not afford the lower courts the opportunity to address this specific claim, it is not appropriate for this Court to review this issue.

B. Petitioner was afforded all of the due process protections required to be given to a contemnor, whether civil or criminal.

Petitioner was given all of the protections afforded to criminal contemnors even though he was held in civil contempt. Therefore, even if Petitioner's argument had some merit — that a civil contemnor should be afforded the protections given to a criminal contemnor — that issue is not raised by the particular facts of this case.

Irrespective of whether the contempt is considered "direct" or "indirect,"[3] Petitioner was only entitled to notice and a hearing and an impartial judge. *Taylor v. Hayes*, 418 U.S. 488 (1974). Petitioner was given notice, had opportunity to be heard and had his case heard by an impartial judge.

In the instant case, the District Court held that Petitioner's actions constituted contempt under both 18 U.S.C. § 401(3) and 18 U.S.C. § 401(1). Petitioner had been subject to

[3] Petitioner argues this contempt was "no doubt . . . indirect." (Pet. 12). This conclusion is apparently based on his misreading of the factual basis of the District Court's holding. Given that all the facts necessary to a finding of contempt were all within the first hand knowledge of the Court, the contempt is more properly classed as "direct." This distinction is of little use generally except as a guide to which contempts *may* be dealt with summarily (direct ones) even though such treatment is discouraged. *See, e.g., Taylor v. Hayes*, 418 U.S. 488, 496-500 (1974). Since Petitioner was not treated summarily in this case, the distinction is of no use here.

an order of the Court to appear for trial. See Argument II, *infra*. He failed to appear as required and thus violated an order of the Court within the meaning of 18 U.S.C. § 401(3). His failure to appear and the misrepresentations made directly to the District Court by Swickle were violations of 18 U.S.C. § 401(1) for which Petitioner was properly held in contempt. *See* Argument III, *infra*. The District Court did not rely on any *ex parte* communications (as argued by Petitioner, Pet. 11, 16), but had before it all of the information necessary to hold Petitioner in contempt. It had the official court records (i.e., the docket sheet and order setting the trial date) and had first hand knowledge of Petitioner's failure to appear and send an adequate substitute counsel.

The due process requirements that are to be afforded one charged with contempt have been established by several decisions of this Court.

1. Notice of a Hearing.

A criminal contemnor whose contempt was commited within the knowledge of the Court is only entitled to reasonable notice of the charge and a reasonable opportunity to defend himself. *Taylor v. Hayes*, 418 U.S. 488, 499 (1974).

Petitioner was given notice of the charges against him in a written Order to Show Cause issued on November 2, 1983.[4] Petitioner had almost two months to prepare for a hearing on the matter. At the hearing Petitioner was given an opportunity to explain his failure to appear by offering evidence and presenting witnesses.

Since the District Court in this case was fully aware, by its own senses, of all the facts necessary to support a find-

[4] Petitioner does not dispute the fact that he was given adequate notice of the charges against him. Further, any objection that Petitioner may have had regarding the adequacy of the notice was waived by Petitioner at the December 22 hearing when he declined the Court's explicit offer to continue the proceeding and put the details of the charges in writing. (Tr. 12/22/83 Hearing 14, Pet.App. 56a).

ing of contempt under either § 401(3) or § 401(1), nothing would be gained by requiring the Court to "prove" that trial was set for October 26 and that Petitioner failed to appear. Considerable time would be wasted to require that certified copies of Court records such as docket sheets and pre-trial and trial orders be introduced into evidence at the hearing.

2. Trial by an Impartial Judge.

Petitioner's argument that his case was not heard by an impartial judge is without merit.

A contemnor is not entitled to have the matter heard by another judge unless the contempt involved disrespect for, or criticism of, the judge or unless contemnor has so provoked the judge that the judge becomes "embroiled" in controversy and "cannot 'hold the balance nice, clear and true between the State and the accused . . .' *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)." *Taylor v. Hayes*, 418 U.S. at 501.

The District Judge was impartial. This case did not involve any disrespect for, or criticism of, the District Judge. *See* F.R.Crim.P. 42(b). Nor did the District Judge become "embroiled" in controversy. The contempt was primarily a failure on the part of Trial Counsel to appear for trial. There is no new issue presented to this Court; its prior decisions are directly controlling.

3. Burden of Proof

Petitioner argues that the burden of proof was improperly put upon him to show that his actions were not contemptuous and that this was an impermissible shifting of the burden of proof. (Pet. 15). He argues that when the Sixth Circuit affirmed the decision of the District Court in this case, it created a split of authority on this issue.

This Court's 1983 decision in *United States v. Rylander*, 460 U.S. 752 (1983), although not cited by Petitioner, is directly on point. In *Rylander*, a taxpayer failed to obey the District Court's enforcement order regarding an I.R.S. summons to produce corporate books and records. The taxpayer

was held in civil contempt. This Court recognized that the contemnor could raise the defence that it was impossible to comply with the order. This Court held that in raising the defence, the defendant bore the burden of production. *Id.* at 756-62.

Petitioner disobeyed an order of the Court when he failed to appear for the trial of his client's case and failed to send an adequate substitute. The Court had before it all of the information necessary to issue an Order to Show Cause to Petitioner to explain why he should not be held in contempt. The Court gave Petitioner an opportunity to appear and explain his conduct. Petitioner could have presented evidence and witnesses to exculpate himself. Petitioner failed to present an excuse satisfactory to the Court. The credibility and merit of his excuse is a matter for the trial court; that issue should not be reviewed.

By affirming the District Court, the Sixth Circuit did not hold that the burden of proof was shifted to Petitioner. It simply upheld the decision of the trial court, which had all of the facts before it to enable it to hold Petitioner in contempt without further fact finding. Thus, this decision of the Sixth Circuit is not in conflict with the cases cited by Petitioner for the proposition that the burden of proof remains on the party claiming contempt, *Matusow v. United States*, 229 F.2d 335 (5th Cir. 1956); *North American Coal Corp. v. Local Union*, 497 F.2d 459 (6th Cir. 1974), or that an order to show cause does not shift the burden of proof to the contemnor, *In re Van Meter*, 413 F.2d 536, 538 (8th Cir. 1969). In the instant case, the burden of proof was not shifted to the Petitioner. The Court had before it, by is direct knowledge, all the factual elements to sustain a finding of contempt. The burden was only on the Petitioner to come forward with a credible excuse that would merit not finding him in contempt. *United States v. Rylander*, 460 U.S. 752, 757 (1983).

C. The law in this area if well-settled by decisions of this Court and does not warrant review at this time

Petitioner is asking the Court to review this case in order to write out of the law the useful, rational distinction between civil and criminal contempts that has guided our courts for nearly a century. If Petitioner's request is granted, not only will a settled area of our jurisprudence be subjected to disorder, but already overburdened courts will be saddled with longer, more burdensome proceedings with no measurable gain in justice or fairness. Equally important, the courts will lose the modicum of flexibility they now have in dealing with the occasional disruptions of their daily business that warrant some action.[5]

The distinction between civil contempt and criminal contempt was recognized and clarified by this Court as long ago as 1911 in *Gompers v. Bucks Stove & Range Company*, 221 U.S. 418 (1911) and has been upheld and used by this Court many times since. *See, e.g., Lamb v. Cramer*, 285 U.S. 217 (1932); *McCrone v. United States*, 307 U.S. 61 (1939); *Nye v. United States*, 313 U.S. 33 (1941); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Maggio v. Zeitz*, 333 U.S. 56 (1947); *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1948); *Shillitani v. United States*, 384 U.S. 364 (1966); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Taylor v. Hayes*, 418 U.S. 488 (1974); *United States v. Rylander*, 460 U.S. 752 (1983).

This Court definitively addressed the issues of due process in the civil contempt context as recently as 1983 in the *Rylander* case. Further review is not necessary at this time.

D. Conclusion

Under the decisions of this Court a civil contemnor is not entitled to all the protections afforded to a criminal

[5] If the Court did wish to rewrite broadly the rules in this area, it would seem more appropriate to do so through promulgation of new Civil Rules.

contemnor. Under the decisions of this Court a contemnor is not automatically entitled to a hearing before another judge. Subject to exceptions not argued or relevant here[6], a contemnor is entitled only to a reasonable notice of the charge and a reasonable opportunity to be heard. A contemnor has the burden of coming forward to show that he was incapable of complying with the order that he violated. There is no unsettled question of law presented by Petitioner on this matter. Nor is there a conflict among the Circuit Courts on this subject.

Petitioner has requested that this Court completely rewrite the law in this area. Much of the law is based upon nearly a century of decisions by this Court. Some of the clarifications by this Court have been recent. Petitioner has not presented any compelling arguments, either with respect to his case, or with respect to contempt cases generally, for such a complete review and revision of the law in this area at this time.

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[6] Fuller due process standards might be applicable in certain circumstances not presented in this case, such as where the contemnor was charged with criminal contempt and sentenced to imprisonment for more than six months. *See, e.g., Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

II. CERTIORARI SHOULD NOT BE GRANTED BECAUSE 1) THE LAW WAS PROPERLY APPLIED BY THE LOWER COURTS CONCERNING 18 U.S.C. § 401(3), 2) THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS WITH RESPECT TO ANY ISSUE PRESENTED BY PETITIONER'S ARGUMENT, AND 3) THE ISSUE RAISED BY PETITIONER RESTS ON A DETERMINATION THAT IS PURELY FACTUAL.

Petitioner argues that this Court should grant certiorari in the instant case to resolve a conflict in the Circuit Courts regarding the construction of the "order" requirement of 18 U.S.C. § 401(3). There is no conflict in the Circuit Courts.

Petitioner argues that:

1. a telephone "message" from the District Court's deputy clerk to Petitioner that Petitioner was expected for trial on October 26, 1983 was not an "order" within the meaning of § 401(3) and, alternatively,

2. even if the "message" was an "order," the sending of an associate fulfilled Petitioner's obligation to the Court.

Both arguments omit crucial facts. Even a cursory review of the facts shows that the Circuit Court's decision in this case is in harmony with the other circuits.

A. There existed an "order" or "command" setting the trial date and requiring Trial Counsel to appear on October 26, 1983; this order was in addition to the "message" that Petitioner was expected for trial on October 26, 1983.

On August 1, 1983, the District Court sent a "Trial Order" to counsel in the underlying case. This "Trial Order" set October 24, 1983 as the trial date. A firm date was set, contrary to the usual practice of the District Court, to accommodate Petitioner's client who was represented to be out of the country.[7]

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[7] See n. 1, *supra*.

On October 19, 1983, Petitioner called the Court to request that the trial date be postponed because he had to be in trial in Baltimore. The trial was rescheduled to October 26, 1983 as a result of this request. The original "order" or "command" to appear at the trial was still in effect; the date of the trial had simply been postponed by two days. Petitioner was aware of the changed date; in fact, he requested it. The docket sheet indicates that the District Court's deputy clerk spoke with Petitioner himself when the date was rescheduled for October 26. (Exhibit C to Memorandum and Order, Pet.App. 37a; clearer copy Respondent's App. A-1).

The foregoing shows that Petitioner was under an order to appear on October 26. On October 24, the deputy clerk relayed a message to Petitioner, through the office of the Judge Howard in Baltimore, that Petitioner was expected for trial on October 26th. (Docket Sheet, Exhibit C to Memorandum and Order, Pet.App. 37a; clearer copy, Respondent's App. A-2). This message was simply a confirmation of a preexisting order requiring Petitioner's attendance.

A tardy arrival for a court appearance is disobedience of an order to appear in court at a specified time and, as such, is contemptuous. *In re Niblack*, 476 F.2d 930, 932-33 (D.C. Cir 1973) (Contemnor was 1 hour and 50 minutes late).

Petitioner argues to this Court that there is no evidence that he in fact received the message regarding his expected appearance on October 26th. However, he admitted at the hearing before the District Court on December 22 that he had in fact received the message from Judge Howard's secretary. (Tr. 12/22/83 Hearing 19-20, Pet.App. 59a). This message merely reinforced his obligation to appear.

The orders setting and resetting the trial date required Petitioner to appear for trial. The original trial date of October 24, was postponed for two days at *Petitioner's* request so that *Petitioner* could try the case. If one of Petitioner's associates could have taken Petitioner's place, there

was no need for the two day delay while Petitioner concluded another case. Further, Petitioner personally signed the Complaint in the case and asked for a jury trial. Petitioner was named as the "Trial Counsel" on the Trial Brief. (Exhibit A to Memorandum and Order, Pet.App. 35a).

The oral continuance of a trial date with the knowledge of all of the appropriate attorneys does not render the underlying order to appear for trial any less effective. This is especially so when the person violating the order is an attorney, who is an officer of the court with obligations to both the Court and his client to appear. When the attorney who fails to appear is the one who requested the change, as in this case, the violation is still more flagrant.

None of the cases cited by Petitioner are applicable to this case. The Circuit Court and the District Court were hardly striking out in new directions in holding that Trial Counsel was obligated to appear for a scheduled trial.

Petitioner argues that *In re Lamarre*, 494 F.2d 753 (6th Cir. 1974) applies to this case. That case held that to be enforced by criminal contempt, an order had to be:

> clear and definite and 'entered' upon the record or records of the court. . . . This normally means a written order issued by the court and personally served upon the alleged contemnor. Such an order may likewise be enforceable if entered in open court in the presence of the person concerned or with his knowledge clearly proved or issued in open court.

Id. at 758.

Because *LaMarre* involved criminal contempt it is not controlling in the instant case. Even if it were, its requirements of a clear and definite order entered upon the records of the court were met by the District Court. The alternative requirement that the contemnor have actual knowledge of the order was also met.

The contemnor in *LaMarre* was an insurance adjuster who had been "requested" to attend a settlement conference. The appellate court found that a "request" did not rise to the level of an "order" within the meaning of 18 U.S.C. § 401(3). In the instant case, Petitioner, an attorney, was subject to a Trial Order scheduling a case for trial. The order was clear and definite. Both the original Trial Order and the subsequent continuance of the date of the trial were entered on the record. The Petitioner had actual knowledge of the trial date. The Petitioner was the trial attorney in the case and had a duty to his client and the court to appear. It can hardly be said that the setting of a trial date is only a "request" that the attorneys in the case appear.

The Petitioner also relies on *In re Stewart*, 571 F.2d 988 (5th Cir. 1978). That case is also distinguishable from the instant case. First, the contempt was held to be criminal in nature. Second, the contemnor, an employer, was alleged to have violated, at most, a "message" which was passed on to him by one of unofficial status, one of his employees. Again, in the instant case, there was a clear and definite order setting the trial date. To the extent that the Order setting the trial date was orally modified, it was done so by personal communication between the Petitioner and the Court's deputy clerk — two officers of the court.

Petitioner cites several other cases, all of which are distinguishable for reasons similar to those of the foregoing cases. *In re Joyce*, 506 F. 2d 373 (5th Cir. 1975) was a case of criminal contempt which involved a "request" not an order. *In re Weeks*, 570 F.2d 244 (8th Cir. 1978) involved a criminal contempt citation under 18 U.S.C. § 401(1) not § 401(3). *United States v. Joyce*, 498 F.2d 592 (7th Cir. 1974) involved criminal contempt for a violation of a "vague and ambiguous" order. *Finney v. Arkansas Board of Correction*, 505 F.2d 194 (8th Cir. 1974) was a case involving yet another unspecific "order".

Finally, and most importantly, if this court were to review this case and adopt Petitioner's suggested reading of

18 U.S.C. § 401(3), courts would be unable to rearrange schedules by telephone and expect complete compliance. To hold that the rescheduling of this case was not an "order" or "command" directing the attorneys to appear would have serious implications. Courts would become leary about rescheduling fixed dates by telephone; some would avoid such rescheduling altogether. Cases truly in need of rescheduling because of dire circumstances (serious illness, etc.) would not be rescheduled.[8] Undoubtably, most attorneys would feel compelled to attend a trial of their client's case as rescheduled. However, when an attorney does not feel compelled to attend, due to the lack of a formal written order personally served on him, the trial court would be powerless to compel attendance directly or compensate those who attended promptly and waited for the derelict attorney.

B. Petitioner's failure to appear was not excused when a substitute appeared at the trial who did not have full authority over the case.

Petitioner claims that by sending substitute counsel to the trial he was discharged of whatever obligation he had to appear before the Court. He argues that the Circuit Court held otherwise and that such holding was in conflict with other circuit court opinions.

Again, Petitioner's presentation of the facts and law is incomplete. Neither of the lower courts disagreed that a

[8] Of course, a continuance could still be arranged if the court issued a written order and served it on those who were to appear or if it called those involved before it and continued the case in open court. Either method would be burdensome on the court. It would be virtually impossible to file and serve a written order for every trial date that is postponed for one or two days, as in the present case. The alternative would be to have all of the parties appear as originally scheduled for trial and then fix the new trial date in open court in the presence of all involved. Such a practice would waste the time and resources of the court, counsel and their clients. Further, requiring one to appear for the ordering of the continuance, when that person is the one seeking the continuance for the reason that he absolutely cannot appear on the scheduled date would defeat the purpose of the requested postponement.

fully prepared substitute counsel with full authority to settle and to try the case might have discharged Petitioner's obligation to the Court. The lower courts did not have to reach this issue. As a matter of *fact*, Petitioner failed to send *adequate* substitute counsel.

Petitioner failed to appear on October 26 for trial as required. Robert Swickle, an associate of Petitioner's, did appear for the plaintiff. As settlement negotiations stalemated, Swickle explained to the Court that he had "been pressed in for this" and that the client needed to talk with Petitioner since "Mr. Jaques [Petitioner] was handling the case." (Tr. 10/26/83, 4; Pet.App. 45a).

Several cases similar to this case have been heard in the Circuit courts. In *In re Marx*, 553 F.2d 874 (4th Cir. 1977), the Fourth Circuit upheld a criminal contempt citation of the District Court. In that case the principal attorney had failed to appear for his client's trial and did not provide a legitimate excuse. Local counsel did appear and tried the case. The Court found that the principal attorney had violated 18 U.S.C. § 401(3) by disobeying the Court's order setting the trial date. The instant case is similar except that the District Court did not go so far as to hold Petitioner in criminal contempt. Rather, it ordered him to compensate those who had been injured by his actions.

In the instant case the District Court determined that Petitioner had not sent an adequate substitute. This determination was made from the facts known to the District Court first hand and included Swickle's own statements regarding his ability and limitations in the case. This finding of fact is not appropriate for review. Due to the factual circumstances of this case, the question of whether a prepared and authorized substitute can relieve a trial attorney from his obligation to appear at the trial was never addressed by the Circuit Court and the District Court. The decisions of those courts are, therefore, not in conflict with the decisions of any other circuit courts.

C. Conclusion

The Sixth Circuit and District Court opinions are not in conflict with other decisions. The law applied in this case is not in dispute. The purely factual nature of the issue makes this issue inappropriate for Supreme Court review. The District Court had before it first hand knowledge of the facts, including the Trial Order, the postponement of the trial at the request of Petitioner, and Swickle's inability to fully handle the case in Petitioner's absence.

It is essential that a trial court have control and authority over its schedule. The demands of the present day on the federal courts are great. The court should be able to require the appearance of the attorney himself or, at a minimum, a fully prepared substitute who has complete authority to commence or settle the case. When an attorney violates the requirement that he appear for trial, it is but a mild sanction to hold that attorney in civil contempt and require that he compensate those who were injured as a result of his conduct.

III. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE DECISIONS IN THIS CASE APPLYING 18 U.S.C. § 401(1) ARE NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT; PETITIONER'S ARGUMENT IS BASED ON A COMPLETE MISREADING OF THE FACTS RELIED ON BY THE DISTRICT COURT IN APPLYING 18 U.S.C § 401(1) TO PETITIONER

Petitioner argues that this Court should grant certiorari because the lower court decisions in this case are in conflict with *Nye v. United States*, 313 U.S. 33 (1941), and the decisions of other circuits. There is no such conflict. Petitioner's claim is based upon a complete misreading of the facts on which the District Court based its decision.

The District Court held Petitioner in contempt under 18 U.S.C. § 401(1) because of his failure to appear at the scheduled October 26, 1983 pre-trial and trial taken together with Petitioner's October 19, 1983 phone call to the Court to request a continuance from the previously set October 24 date to the October 26 date. The District Court held that these two events — Petitioner's request for a continuance until October 26 and then his failure to appear on that date — combined "to constitute misbehavior 'so near' to the presence of this Court as to fall within § 401(1)." (Memorandum and Order, Pet.App. 29a).

The District Court further held that such failure to appear was misbehavior that "obstructed the administration of justice. Had Jaques appeared as scheduled on October 26, 1983, the trial could have commenced, or the settlement discussions could have been more than just a dilatory charade. . . . Jaques' failure to appear, and his day to day continuances prevented this Court from either proceeding with Ahmed's trial or scheduling a substitute matter." (Memorandum and Order, Pet.App. 30a).

The District Court held that while the Petitioner's failure to appear was a "serious matter", the Petitioner's misrepre-

sentations regarding his reasons for not attending served to compound his offense. The Court regarded the misrepresentations as a "very serious matter." (Memorandum and Order, Pet.App. 30a).

The misrepresentations referred to by the District Court were those made in person, directly to the Judge, at the October 26, 1983 pre-trial by Petitioner's associate, Robert Swickle.[9] Swickle represented that Petitioner was in Baltimore in trial (Tr. 10/26/83 P.T., Pet.App. 43a) when in fact Petitioner had been excused by the Baltimore Court the previous day ostensibly in order to attend the Cleveland trial. The District Court found these facts expressly in its Memorandum and Order (Pet.App. 27a; *see also* Memorandum and Order, Pet.App. 22a).

Petitioner states that he expressly sent Swickle in his stead. (Tr. 12/22/83 Hearing 19, Pet.App. 59a). In light of these facts, the District Court's finding that Petitioner was liable not only for his failure to appear, but also for the misrepresentations was well-founded. Since the misrepresentations were made directly to the Court at a pre-trial, the "misbehavior" is properly viewed as having taken place in the actual presence of the Court, as required by § 401(1).

The District Court did not base its holding in any part on the October 25, 1983 phone call from Petitioner's associate, Gary Baun, to the Court.

Petitioner's claim that "Thus the critical issue is whether that conduct [Baun's October 25 phone call] falls within the 'so near thereto' language of the statute," Pet. 27, is entirely incorrect and based on a complete misreading of the District Court's Memorandum and Order.

Even without the issue of misrepresentation, Petitioner's failure to appear for a scheduled trial in which he was Trial Counsel constitutes "misbehavior" "so near" to the Court

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[9] Swickle was sent to appear directly by Jaques. (Tr. 12/22/83 Hearing 19, Pet.App. 59a).

as to constitute an obstruction of the administration of justice rendering Petitioner liable for civil contempt under § 401(1). Indeed, a plain reading of the language of the statute would find Petitioner's failure to appear to be misbehavior in the *actual* presence of the Court.[10]

This holding of the District Court and its affirmance by the Court of Appeals does not conflict with the cases cited by Petitioner. The decisions are in full accord with the *Nye* construction of the 'so near thereto' language of § 401(1) as having a geographical reference only. *Nye v. United States*, 313 U.S. 33, 47-52 (1941); *Farese v. United States*, 209 F.2d 312 (1st Cir. 1954), *Schmidt v. United States*, 124 F.2d 177 (6th Cir. 1941) and *In re Stewart*, 571 F.2d 958 (5th Cir. 1978), involved actions outside the actual physical presence of the court in accord with the *Nye* construction of "so near thereto". *Farese*, *Schmidt* and *Stewart* are not in conflict with the decisions in the present case. In each of these cases it was the actual physical act of the actor that was disruptive of the court. As such, the courts' inquiries focussed on the geographical proximity of those acts to the courts themselves. In the instant case, it was not *what* Petitioner was doing that was disruptive of the Court, but what he was *not* doing. It was Petitioner's *non*-appearance at the scheduled trial that was disruptive. *That* (non-)act was directly cognizable by the Court and immediately disruptive. As such, it was grounds for the Court's holding Petitioner civilly liable for contempt under § 401(1).

Not only was Petitioner's failure to attend misbehavior in the actual presence of the Court, but Swickle's representations were without doubt also in the actual presence of the Court. Petitioner argues that Petitioner cannot be held

[10] This offending conduct of failing to appear was only made more pointed by the fact that the trial was put off two days at ='s personal request so that he could attend. As the District Court noted: "Jaques' own telephone call on October 19 indicates that he was aware of his obligation to attend, and he was aware that the Court was continuing the trial date solely for the purpose of accomodating him." Memorandum and Order, 30a.

vicariously liable for the misrepresentations of his associate. Although Petitioner focuses solely on the Baun phone call, his argument is applicable, or inapplicable, to the representations made by Swickle to the District Court. Petitioner claims that the decisions in this case are irreconcilable with *North American Coal Corp. v. Local Union*, 497 F.2d 459 (6th Cir. 1974). This is not so. In *North American Coal* the Sixth Circuit held that there could be no vicarious *criminal* liability on the part of the officers of a union for the acts of the union's members. The Sixth Circuit merely applied sound principles of criminal law to the area of labor unions in light of the expressed Congressional intent not to weaken "labor unions as a social institution." *Id.* at 466. Competing concerns in the civil area, such as compensation to the victims of the defalcation, require that we be civilly liable not only for our own, direct acts, but also for the acts of our agents and partners.[11]

Attorneys are under a particular duty as officers of the courts to be forthright in their dealings with the courts. *See, e.g.*, A.B.A. Code of Professional Responsibility, DR 7-102(A)(5).

The District Court in this case required no more of Petitioner than that he compensate the victims of his misbehavior for the expenses caused directly by him.

In sum, there is no legal issue for this Court to resolve. The District Court properly identified the acts of misbehavior that obstructed justice. These acts — both the failure to attend and the misrepresentations — provided the Court with adequate bases to hold the Petitioner civilly liable for either act. Petitioner's arguments are based on a misreading of the holding of the District Court decision. The

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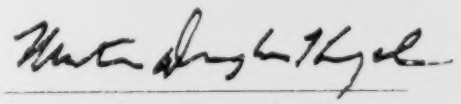
[11] Such vicarious civil liability has been a significant part of the common law at least since the 13th century. Bracton, in mid-13th century, writes of the civil liability of masters for the wrongful acts of their servants that are not affirmatively disclaimed. Bracton, ON THE LAWS AND CUSTOMS OF ENGLAND, f. 158 (servant's acts with respect to chattels), ff. 172, 204 (servant's acts with respect to land) (Ed. Thorne, 1968).

decisions of the lower courts in this matter are in full accord with *Nye* and its progeny.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,



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The Honorable Ann Aldrich,
United States District Judge
for the Northern
District of Ohio

January 23, 1986

APPENDIX

4-9-83 1-83
4:00
10-25-83
4:00

(1)

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YEAR	J	NOS	A	O	R 23	DEMAND $	OTHER	JUDGE/MAG NUMBER	JURY DEM.	YR	DOCKET NUMBER
0647	01	80	0506	04	04	80	3	340				NEAREST $1,000 $1,200,000.00		4713	J	80	0506

PLAINTIFFS

AHMED, Ali S.

DEFENDANTS

REISS STEAMSHIP COMPANY

EXHIBIT C

CAUSE

46 USCA §688, et seq (Jones Act); General Admiralty & Maritime Law

JUDGE ALDRICH

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JURY

1-10-83 Pltf's resp per Baum - 4 trials set in Tampa starting 1-17-83 - will be unavailable due to ill, Dept in Yemen since Sept. 82, - no set P.T. as 4-5-83 4:00 C, he will have pltf's here, he will send letter to Court & Dept, per Dailey's resp.

3-21-83 Notice: P.T. re-set to 4-11-83 4:30 C

Action arose in Cuyahoga County (Category 48)

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID DATE	RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	4-4-83	# 14122		44 4/30/80	
				44	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

4-13-83 Notice Dep. T. 10-4-83 (5 days) 9:30 C P.T. 10-3-83 4:00 C, briefs 9-26-83, Notices mailed

8-1-83 Notice: T. 10-24-83 9:00 C P.T. 10-20-83 4:00 C

10-19-83 Pltf's resp per Jaques - move P.T. re 10-20-83 4:30 C & T. re 10-24-83 9:30 C per Dailey's resp, per Swickle's resp

10-24-87 Phone conf per Judge's Secretary's req - counsel foregues to be in Aldrich's room Wed for trial - his partner can take verdict in Balto, per Bailey - P.T. Med. A.N., per Swickle.